**ROBIN TAN PANG HENG ABDULLAH (MENDAKWA SEBAGAI PEGAWAI AWAM PENANG TURF CLUB)**

**v.**

**KETUA PENGARAH KESATUAN SEKERJA MALAYSIA & ANOR**

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
ZAINUN ALI JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: P-02-72-2001]
17 FEBRUARY 2010

***LABOUR LAW:*** *Trade union - Registration - Judicial review - Members of union were workers of Penang Turf Club - Whether members casual workers and therefore could not be represented by union - Whether Director General of Trade Union acted ultra vires in registering union - Whether judicial review premature given alternative remedy under s. 71A Trade Unions Act 1959*

***CIVIL PROCEDURE:*** *Action - Judicial review - Registration of trade union - Members of union were workers of Penang Turf Club - Whether members casual workers and therefore could not be represented by union - Whether Director General of Trade Union acted ultra vires in registering union - Whether judicial review premature given alternative remedy under s. 71A Trade Unions Act 1959*

***ADMINISTRATIVE LAW:*** *Judicial review - Registration of trade union - Members of union were workers of Penang Turf Club - Whether members casual workers and therefore could not be represented by union - Whether Director General of Trade Union acted ultra vires in registering union - Whether judicial review premature given alternative remedy under s. 71A Trade Unions Act 1959*

***UNINCORPORATED ASSOCIATIONS:*** *Clubs - Registration of trade union - Members of union were workers of Penang Turf Club - Whether members casual workers and could not be represented by union - Whether Director General of Trade Union acted ultra vires in registering union - Whether judicial review premature given alternative remedy under s. 71A Trade Unions Act 1959*

A ***WORDS AND PHRASES:*** *"may" - Section 71A Trade Unions Act 1959 in para after provision (l) - Interpretation of - Whether appellant given option to appeal to relevant Minister against decision of Director General of Trade Unions and not a right to apply for judicial review*

B This was the appellant's appeal against the dismissal of his action against the respondents for judicial review on a preliminary objection raised by the respondents. The objection was that the appellant failed to exhaust the alternative remedy under s. 71A of the Trade Unions Act 1959 ('the Act') before commencing the action for
C judicial review. The appellant was the Penang Turf Club whilst the 1st respondent and the 2nd respondent were the Director General of Trade Unions and the Penang Turf Club Race Day Worker's Union respectively. The 2nd respondent was registered as a trade union by the 1st respondent under s. 12(1) of the Act. It was the appellant's
D case that the members of the 2nd respondent were casual workers and that the 2nd respondent could not be registered to represent casual workers.

**Held (dismissing the appeal with costs)**
**Per Zainun Ali JCA delivering the judgment of the court:**

E

**(1)** The instant appeal did not fall within the exceptional circumstances for the court to consider the action given that an alternative remedy was provided by statute. (para 22)

F **(2)** The 1st respondent had not acted *ultra vires* since he was merely exercising his function and duties under the Act. In fact, it was premature to invite the court to review the decision of the 1st respondent when the provision for appeal to the relevant Minister was comprehensively laid down under the Act.
G Therefore, there was no illegality in the 1st respondent's decision to register the 2nd respondent. (para 23)

**(3)** The word "may" in the para after provision (l) of s. 71A(1) of the Act gave an option to the appellant to appeal to the
H relevant Minister and not a right as such to apply for judicial review considering the alternative remedy. (para 25)

*[Deposit of appeal to be awarded to respondent for taxed costs.]*

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***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap penolakan tuntutan semakan kehakimannya terhadap responden-responden atas bantahan awal yang dibangkitkan oleh responden-responden. Bantahan tersebut adalah bahawa perayu telah gagal memanfaatkan dahulu remedi alternatif di bawah s. 71 Akta Kesatuan Sekerja 1959 ('Akta') sebelum memulakan tindakan. Perayu adalah Kelab Lumba Kuda Pulau Pinang sementara responden pertama dan responden kedua adalah masing-masing Ketua Pengarah Kesatuan Sekerja dan Kesatuan Pekerja-Pekerja Hari Perlumbaan Kelab Lumba Kuda Pulau Pinang. Responden kedua telah didaftar sebagai sebuah kesatuan sekerja di bawah s. 12(1) Akta. Adalah menjadi kes perayu bahawa ahli-ahli responden kedua adalah pekerja-pekerja sambilan dan bahawa responden kedua tidak boleh didaftarkan untuk mewakili pekerja-pekerja sambilan.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:**

**(1)** Rayuan semasa tidak termasuk ke dalam halkeadaan istimewa bagi membolehkan mahkamah menimbang tuntutan, memandangkan satu remedi alternatif telah diperuntukkan oleh statut.

**(2)** Responden pertama tidak bertindak secara *ultra vires* kerana ia hanya melaksanakan fungsi dan tanggungjawabnya di bawah Akta. Malah, adalah pramatang untuk meminta mahkamah untuk menyemak keputusan responden pertama bilamana peruntukan untuk merayu ke Menteri yang relevan telah dibentangkan secara terperinci oleh Akta. Oleh itu, tidak timbul soal ketaksahan tindakan responden pertama dalam mendaftarkan responden kedua.

**(3)** Perkataan "bolehlah" di dalam perenggan selepas peruntukan (I) s. 71A(1) Akta memberikan opsyen kepada perayu untuk merayu kepada Menteri yang relevan dan bukan memberikannya hak untuk untuk memohon semakan kehakiman mengambilkira remedi alternatif.

*[Deposit rayuan diaward kepada responden ke arah kos ditaksir.]*

**Case(s) referred to:**

*Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC* ***(refd)***

*Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC* ***(refd)***

*Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC* ***(refd)***

**Legislation referred to:**

Societies Act 1966, s. 8A

Trade Unions Act 1959, ss. 12(1), 71A

*For the appellant - Steven Thiru (Faisal Moideen with him); M/s Shook Lin & Bok*

*For the respondents - Suzana Atan (P Subramaniam with her) SFC*

*[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-288-1995]*

*[Editor's note: For the High Court judgment, please see Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2002] 1 CLJ 772]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Zainun Ali JCA:**

**[1]** In the High Court could, the appellant's claim was dismissed at the initial stage of the trial, on a preliminary objection raised by the respondent. The objection was that the appellant had failed to exhaust the statutory appeal procedure/alternative remedy contained in s. 71A of the Trade Unions Act 1959 ("the Act") before commencing the action in the High Court.

**[2]** We heard this appeal and unanimously dismissed it with costs. Our reasons are as appended below.

### Background

**[3]** The Penang Turf Club, through one of its public officer (s. 8A Societies Act 1966) initiated action in the High Court over the registration of the 2nd respondent under s. 12(1) of the Act as a trade union of workmen by the 1st respondent.

**[4]** The first respondent is the Director General of Trade Unions ("the DGTU") whilst the 2nd respondent is the Penang Turf Club Race Day Worker's Union ("the workers union"). A

**[5]** The 2nd respondent was registered under s. 12(1) of the Trade Unions Act 1959. A Certificate of Registration of the 2nd respondent sent a notice of claim for recognition, the Certificate of Registration and the Rules of Union to the appellant. However *vide* letter dated 13 February 1995 the appellant informed the 2nd respondent that they were unable to accord recognition to the 2nd respondent on the ground that legally a trade union cannot be registered to represent casual workers who are hired to work on weekends or on other race days only. B C

**[6]** In short, it was the appellant's case that the race day workers, being "casual workers", do not come within the purview and ambit of the Act. D

**[7]** The appellant went on to contend that by registering the 2nd respondent as a trade union, the 1st respondent (the DGTU) had acted *ultra vires* the Act and thus his decision was a nullity. E

**[8]** Against the defence of the 1st respondent that the registration of 2nd respondent as a trade union is regular and in compliance with the provisions of Trade Unions Act 1959 and the Trade Unions Regulations 1959, and the defence of the 2nd respondent that the appellant's workers carried out work at the appellant's premise and that a good number of them have been so employed for over a decade, in the same job by the appellant, the appellant commenced proceedings by way of originating summons. F

**[9]** The appellant sought the following orders: G

2.5.1 That the registration of the 2nd respondent be declared null and void and of no effect;

2.5.2 That the Certificate of Registration No 737 dated 22 November 1994 be revoked and cancelled. H

**[10]** The said originating summons was later converted to a writ action on 10 April 1996.

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**[11]** The Senior Federal Counsel who represented the 1st respondent raised a preliminary objection. This relates to the issue of non-exhaustion of remedies available to a party in a suit. The Senior Federal Counsel contended that before instituting the suit, the appellant ought to have exhausted the remedy of appeal which was available to him, under s. 71A of the Trade Union Act 1959 reads:

> Section 71A of the Trade Unions Act 1959 (TAB 1 of 1A (R1) reads:
>
> (1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, given, made or effected by the Director General under any of the following provisions:
>
> (a) section 2(2);
>
> (b) section 12;
>
> (c) section 15(2)(b) or section 15(4);
>
> (d) section 16(1);
>
> (e) section 17(1);
>
> (f) section 25A (4);
>
> (g) section 28(1) (d), or section 29(2)(b);
>
> (h) section 34(2);
>
> (i) section 40(6) or 40 (9);
>
> (j) section 54(1);
>
> (k) section 76A(1); or
>
> (l) section 76C(1);
>
> may, within thirty days from the date of the opinion, order, declaration, refusal, cancelation, withdrawal, direction or decision of the Director General, appeal against the same to the minister, in such manner as may be prescribed by regulations.

(2) An appeal under subsection (1) shall not operate as a stay of execution of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision, as the case may be, of the Director General unless the Minister otherwise directs, and where he so directs he may impose such terms and conditions as he deem it fit.

(3) The Minister may, after considering any such appeal, give such decision thereon as he deems just and proper.

(4) A direction or decision of the minister under this section shall be final and conclusive.

**[12]** The 1st respondent substantiated its preliminary objection on the basis of authorities such as *Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 and *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 (SC).

**[13]** In the former case, the Supreme Court held that: The appellant had a right of appeal against the decision of the High Court in refusing to hear the reference and thereof had failed to avail itself of the alternative remedy. It has accordingly no specific legal right to apply for *mandamus* in this case.

**[14]** In the latter case, Hashim Yeop Sani SCJ observed that:

> ... the discretion is still with the court but where there is an appeal provision available to the application *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

**[15]** The appellant on the other hand, contended at length to the following:

(a) That the appellant refused to recognize the 2nd defendant since in their view, legally, a trade union cannot be registered to represent casual workers who are only hired to work on weekends or other race days;

(b) that these casual workers are mainly involved on race days which usually fall on the weekends and on public holidays. Should a worker be absent, a replacement worker would be hired or assigned the job. Where a worker is unable to turn up for work, he would not be paid any wage;

A (c) the appellant does not exercise any disciplinary right over the workers to their attendance or absence. The matter is left entirely to the worker's free will as to whether they wish to work during the weekend or on race days to earn extra income.

B (d) that these casual workers are in fact regularly employed elsewhere.

(e) thus they do not fall within the purview of Part XII of the Employment Act 1955. They are also not entitled to any benefit under any collective agreement and as a result, they are C not entitled to organize themselves and form a trade union of workers.

**[16]** The main defence of the 1st defendant was that the registration of the 2nd defendant as a Trade Union is regular and D in compliance with the provision of Trade Union Regulations 1959 and the members of union are paid workers of Penang Turf Club.

**[17]** The 2nd defendant's defences *inter alia*, stated that they are paid fortnightly on a regular basis; they contribute to EPF and E SOCSO which are deducted at source that the appellant exercises control over them through its Totalisator Manager and other staff over the manner in which the workers perform their work; that the workers are very much an integral part of the plaintiff's business; and lastly, that the appellant was wrong in commencing this suit F without first exhausting its remedy under s. 71 of the Amended Act.

**Our Findings**

**[18]** The learned High Court judge ruled that the appellant had G failed to demonstrate that the 1st respondent had acted unfairly or had abused his powers to warrant a judicial interference; or that it was more expedient to go for judicial review rather than to appeal.

**[19]** The learned High Court judge had considered the appellant's H claim in the light of the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65.

**[20]** After having heard parties and reading the documents and I material available before us, we were unanimous in dismissing the appellant's appeal with costs.

**[21]** Our grounds are as follows:

**[22]** We are of the view that this appeal does not fall within the exceptional circumstances for the court to consider the application for declaration, where there is an alternative remedy provided by statute.

**[23]** It is also our view that the 1st respondent had not acted *ultra vires* since he was merely exercising his function and duties under the Trade Unions Act 1959.

**[24]** In fact it is premature to invite the court to review the decision of 1st respondent when the provision for appeal against the 1st respondent to the Minister is comprehensively laid down in the Trade Unions Act 1959. Thus there is no illegality in the action of 1st respondent.

**[25]** Regarding the word "may" in the relevant provision of the Act, we are of the view that this gives an option to the appellant to appeal to the Minister, rather than giving a right to apply for judicial review when there exists an alternative remedy.

**[26]** In the circumstances, since this appeal is dismissed with costs, the deposit for this appeal is to be awarded to the respondent to account for taxed costs. The order of High Court is hereby affirmed.